In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-69

LUTHER L. STREET, SR., Individually and Administrator of the Estate of LARRY GLEN STREET Deceased, BARBARA LAVERNE STREET, Natural Mother of the Deceased and DAVID LEROY STREET and TERRY LYNN STREET, Natural Brother and Sister of the Deceased

Respondents

versus

MOHAWK TOWING COMPANY, INC. and THE HOME INSURANCE COMPANY,

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOHAWK TOWING COMPANY, INC. and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Mohawk Towing Company and The Home Insurance Company, respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit, dated June 2, 1978.

OPINIONS BELOW

The judgement of June 2, 1978 of the Court of Appeals for the Fifth Circuit affirmed the judgement of the District Court. No reasons for judgement or any other views were given by the Summary Panel, to whom the appeal was

allotted for decision. (Appendix A) Nor were reasons for judgement given by the District Court in denying Petitioners Motion for Judgement Notwithstanding the Verdict or New Trial or Remittitur (Docket Sheet, USDC, E.D. LA. Appendix B).

Petitioners, after considering the views of the United States Court of Appeals for the Fifth Circuit concerning applications for rehearings and motions for hearing en banc (Appendix C) elected to petition this Court for a writ of certiorari, without requesting the United States Court of Appeals for the Fifth Circuit for a rehearing or hearing en banc.

JURISDICTION

The final decree of the Court of Appeal for the Fifth Circuit sought to be reviewed was entered on June 2, 1978 (Appendix B, Supra.) This petition has been filed within ninety days from the entry of said decree. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S. Code 1254(1) in that Petitioners seek review of the decision of the United States Court of Appeal for the Fifth Circuit, by writ of certiorari.

QUESTIONS PRESENTED

Petitioner, Mohawk Towing Company, Inc., a small family owned towing company, was the owner of a towboat named the M/V Mohawk Express. Petitioner, The Home Insurance Company is the insurer of Mohawk Towing Company, Inc. and the M/V Mohawk Express under hull and P & I policies of insurance.

Respondents sued Petitioners for damages for the disappearing and alleged death of their son and brother, Larry Glen Street, alleging liability under the general maritime law and the Jones Act upon a unitary set of facts and circumstances. The District Court referred both the question of "seaworthiness", the test for liability under the general maritime law and "negligence", the test for liability under the Jones Act to the jury.

After retiring to deliberate upon its verdict, the jury requested the District Court for further instructions as to "seaworthiness." The jury was returned to the jury box and the District Judge, without comment or opposition for Counsel for Respondents or Petitioners, again read his charge to the jury concerning seaworthiness and the obligations of a vessel owner to its crew, i.e. Larry Glen Street.

At the conclusion of its deliberation, the jury returned a verdict that the M/V Mohawk Express and her tow were "seaworthy" and that Mohawk Towing Company was "negligent." The jury found Larry Glen Street 15% contributory negligent, awarded Luther L. Street $101,000.00 and Barbara Laverne Street $123,000.00 (Appendix D).

The District Court denied Petitioners subsequent Motion for Judgement Notwithstanding the Verdict or New Trial or Remittitur without expressing any opinion concerning the issues submitted by Petitioners, which are the issues raised here. Petitioners appeal was based on the issues submitted to the District Court. The Court of Appeal affirmed, without opinion.

The questions presented are:

1. When a claim for injury or death of a member of the crew of a vessel is alleged under both the general maritime law and the Jones Act based upon a unitary set of facts and circumstances, does a finding that the vessel was seaworthy permit a finding that the owner was negligent and support a verdict of negligence?

2. When a crew member falls overboard from a barge underway, in broad daylight in the presence of other crew members and no evidence is presented to show or infer the reasons or cause for the crew member falling overboard, can the employer be negligent?

STATUTES INVOLVED

This case arose under 28 U.S.Code 1333 conferring original jurisdiction to United States District Courts in civil cases of admiralty or maritime jurisdiction and under the Jones Act, 46 U.S.C. § 688. No other statutes or regulations are applicable and none were introduced into the record by Counsel for Respondents or Petitioners.

STATEMENT OF THE CASE

In the early part of 1975, probably January, Larry Glen Street, then unemployed, approached Capt. Autrey Encalade of the M/V Mohawk Express, which was being put in commission at Orange, Texas, seeking employment. After consulting with one of the vessel's owners concerning employment of the young, inexperienced man as a deckhand, Street was hired by Mohawk Towing Company, Inc. for a probationary period.

Street was instructed in his duties by Capt. Encalade.

Street learned well and rapidly the duties of a deckhand aboard a towboat such as the M/V Mohawk Express, performing his duties properly and safely. He worked steadily for Mohawk Towing Company from the date of his employment, except for some time off, until March 11, 1975 when he fell overboard from a barge in tow of the M/V Mohawk Express while underway in the Mississippi River. At the time the M/V Mohawk Express was pushing three barges made up in tandem, with a fourth barge made up along the starboard side of the third barge. Street and other crew members shortly after the tow got underway, commenced the routine task of "doubling up", that is to say, to put additional wire cables over the lines or cables which were then securing the barges to each other and the towboat. To tighten these additional wire cables, rachets are secured between the wires and a bitt or other fixed object on the barge. As the rachet is turned, the cable tightens.

Street and other crew members had "doubled up" the cables between the first and second and second and third barges of the tow, without difficulty or incident. Street and another deckhand, O'Dell were engaged in doubling up the lines between the third barge and the fourth barge which was on its starboard side. O'Dell tightened the rachet for several minutes without incident or difficulty.

O'Dell and Street were joined by the cook of the M/V Mohawk Express, the cook taking over the holding of the iron bar called a "toothpick" which is inserted in an eye at the end of the rachet to keep it from turning when the rachet is being worked. Shortly after Carr, the cook, took over this function from Street, Street relieved O'Dell on the rachet handle, in which had been inserted another length of pipe,

known as a "cheater bar". This piece of pipe fits over the rachet handle and gives the person using it considerably more than leverage that is obtained by the use of relatively short handle on the rachet.

Street took one or two strokes with the cheater bar and fell overboard, directly in front of the barge on the starboard side of the barge on which he was working. He surfaced once immediately under the rake of the barge in tow, went under the barge and has not been seen since.

Subsequently, on May 22, 1975, respondents filed suit against petitioners in the United States District Court, Eastern District of Louisiana seeking damages in the sum of $675,000.00 plus interest and costs.

The complaint alleged the "negligence" for which recovery was sought under the Jones Act, and "unseaworthiness" of the tug and her tow under the general maritime law.

The matter was tried before the United States District Court, Eastern District of Louisiana, Section H, with a jury.

Respondents claims were based upon a unitary set of facts and circumstances purporting to support the alleged "negligence" of Mohawk Towing Company and the alleged "unseaworthiness" of the M/V Mohawk Express.

SUMMARY OF EVIDENCE AND CONTENTIONS OF THE PARTIES

(a) *Respondents Evidence*

To support their claims, respondents introduced evidence

to establish that Mohawk Towing Company had not compelled Larry Street to wear a life preserver while working on the barge. No evidence, of any nature whatsoever was introduced by respondents to show how his failure to wear a life preserver caused or in any way contributed to his falling overboard, nor is there any presumption that it would. If the failure of Street to wear a life preserver caused or in any way contributed to his accident, which is denied, then petitioners cannot be held responsible inasmuch as many life preservers were aboard the M/V Mohawk Express readily available for use of her crew. Accordingly, the decision not to use one was his free choice and does not support a verdict against the vessel or her owners.[1]

While much was said about a mythical Coast Guard regulation requiring crew members to wear life preservers while working on barges, no such regulation was introduced in the record or otherwise produced. It could not be introduced or produced because it does not exist.

Respondents and their witnesses were apparently confused by the fact that Coast Guard regulations require motor vessels to carry an approved life preserver for each person on board (Appendix E). This regulation does not require members of the motor vessels crew to wear them when working on barges or elsewhere.

Respondents attempted to support their claim with the testimony of two so-called experts and one witness to the accident.

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1. *Berke v. Lehigh Marine Disposal Corp.*, 2 Cir., 1970, 435 F.2d 1073, cert. denied, 404 U.S. 825, 92 S.Ct. 55, 30 L.Ed. 2d 53.

One of these purported experts, a former Air Force officer whose duties before retiring, with the rank of Major, involved investigating air craft accidents, suggesting safety measures, etc. His qualifications in any other field, except motorcycle accidents, which he was investigating for the University of Southern California when he testified, were academic only. He never worked on a tug, never worked on a barge, and had never investigated a marine accident. The Trial Court did not consider him to be qualified as an expert on maritime matters and accidents, and did not permit him to testify as such. He identified a so-called safety manual purportedly used by *towboat companies* which had been given to him by counsel for respondents the night before he testified.

This so-called expert had no knowledge or information as to the experience or knowledge of the company which had prepared the alleged manual or practical experience of the person who prepared it.

He had no knowledge of any use of the so-called manual by tow boat operators operating on the lower Mississippi River or in the Intracoastal Waterway.

His experience, if any, was in industries having no connection or relationship with the inland marine industry. While advocating special safety meetings should be held with the crews who manned the vessels engaged in that industry, he was completely unaware of the relationship between the members of the crew and their captain and "the physical aspects of maritime employment which inescapably gives living and working a common experience."[2]

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2. *Vickers v. Tumey*, 200 F 2d. 426, (5th Cir. 1961).

Respondents' other so-called expert witness was a former seagoing tug captain. The Trial Court had strong reservations concerning his expertise as an inland towboat captain. The Court initially refused to accept him as an expert and later reversed itself. It is doubtful that the Court would have permitted this witness to testify, if it had then been known, as subsequently developed, that this Captain believed crew members on towboats were required to hold ordinary seamen's papers, if not able seamen's papers, issued by the Coast Guard.

This witness had never operated a vessel like the M/V Mohawk Express or made up a tow similar to the one she was pushing.

At best his experience on the Mississippi River was sparse.

He admitted that he observed crew members working on barges under tow in the Mississippi River not wearing life jackets while working on barges in tow, however, he insisted that he was able to have his crew members do so under threat of dismissal.

The witness also testified that the method of rigging a ratchet was a matter of personal preference and he preferred to stand up and push on the cheater bar, rather than to have the cheater bar lying on the deck and pull up on it, as Captain Encalade had testified he had instructed Street and had instructed all of his crew members for some 15 years to do.

No evidence was offered by respondents by this or any other witness to show any practice or custom of the inland marine towing industry to use a so-called safety manual in

instructing their crews in their duties, nor was any evidence or testimony submitted to establish any industry practice or custom of holding safety meetings. No such showing was possible, for none exists.

Ralph Carr, the only witness present at the scene of the accident, the cook of the M/V Mohawk Express, testified the wearing of life jackets while working on barges was dangerous. He said that crew members considered them too bulky to work in and fearful that a portion of the life jacket might catch on some part of the Barge, cause them to lose their balance and fall overboard.

Carr said he voluntarily went out on the barge where O'Dell and Street were working on the lines. Street relieved O'Dell who had been working the rachet. He pushed on the cheater bar, and he fell overboard. No testimony was given by Carr, or anyone else concerning any defect of the rachet or any other gear which could have caused or contributed to his fall.

The only other witness for respondents, other than respondents, was a statistician who, using the improbable premise, that a 19 year old man, would continue to contribute to his mother and father the same alleged proportion of his income which he allegedly contributed to pay old family debts for the rest of each of their projected natural lives, testified as the projected support they would have received, if Larry Street had not disappeared.

(b) *Petitioner's Evidence*

Captain Autrey Enclade of the M/V Mohawk Express, a

tow boat captain with twenty years experience testified he had recommended employment of Larry Street on a probation period, had personally trained him in his duties, found him to be a quick learner and very capable in performing his duties. He had instructed Street in what he considered to be the safest way to tighten a rachet. That is, to let the cheater bar lie flat on the deck, stand alongside of it and pull up. Used in that fashion, the crew member has maximum leverage and maximum safety being less likely to lose his balance than if standing and pushing.

He testified he was responsible for the training of Street and had instructed him in safety while he was instructing him as to his duties, all of which Street learned and understood.

Richard M. Jones and Richard M. Jones, Jr., owners of Mohawk Towing Company, both testified that the captains of the vessels their company owned were responsible for the training of their crews in safety and in their duties and agreed that the method Captain Encalade used in training Street for tightening a rachet was the preferred and safest one. Both said they had heard of safety manuals, disagreed with the method for tightening a rachet shown in the one identified by the so-called safety expert and denied any use or acceptance of such safety manuals in the towing industry.

The testimony of these three was corroborated by Capt. John Walker, Port Captain for a towboat company operating in New Orleans. Capt. Walker had been employed in the towing industry for forty years having been deckhand, engineer and towboat captain. His qualifications as an expert in the towing industry were accepted by the Court without reservation.

Capt. Walker agreed that instructing crew members was a job for the captain of the tug to which they were assigned, the method Street was instructed to use in tightening a rachet was the preferred and safest one; the method shown in the so-called safety manual was not accepted in the industry and that safety manuals and safety meetings were not in general use in the marine towing industry.

The case was tried before a jury. Both at the conclusion of respondents evidence and the conclusion of all of the evidence, petitioners moved for a directed verdict on the ground that it had not been shown that Street's failure to wear a life jacket caused him to fall overboard, there was no evidence of any failure of any of the gear of equipment of the M/V Mohawk Express or her tow and that if Street had been pushing on the cheater bar which was responsible for his falling overboard he was performing his duties in a manner contrary to the way he had been instructed to do. Both motions were denied by the District Court.

VERDICT, POST TRIAL MOTIONS AND APPEAL

In the course of it's deliberations, the jury asked for and had the charge with respect to seaworthiness read to them again. Thereupon the jury returned a verdict finding the vessel seaworthy, but the owner, Mohawk Towing Company, negligent and awarded damages to the parties and in the amounts set forth above.

Petitioners moved for Judgement Notwithstanding the Verdict or a New Trial or a Remititur basing their motion on the facts and jurisprudence hereinafter discussed. Petitioners motions were denied by the District Court. Petitioners

appealed to the United States Court of Appeals for the Fifth Circuit, basing their appeal on the facts set forth in the record and the jurisprudence hereinafter discussed. The Court of Appeals "affirmed" the judgement of the trial court.

The Court of Appeals, as noted in Appendix A, did not express any opinion concerning the serious errors of the District Court. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The jurisprudence of the Courts of Appeal for the First and Second Circuit, approved by this Court in two cases, makes it abundantly clear that if this matter had been tried in any of the District Courts of those Circuits and the District Court failed to grant a judgement Notwithstanding the Verdict on the issue of negligence under the Jones Act after a finding by the jury of seaworthiness under the general maritime law, the District Court would have been reversed.

The obvious and apparent conflict in the jurisprudence between the Courts of Appeal for the First and Second Circuits, approved by this Court, and the Court of Appeal for the Fifth Circuit standing alone warrants and requires the issuance of the writ herein petitioned for.

The decision by the District Court and its affirmance by the Court of Appeal for the Fifth Circuit are in conflict with several decisions of this Court, other than those mentioned above, where the Court has considered and compared the obligations of an owner to furnish its crew with a seaworthy vessel and the liability of the owner for negligence under the

Jones Act.

The decision of the District Court, affirmed by the Court of Appeals conflicts with and ignores not only the decisions of the First and Second Courts of Appeal which were approved by this Court, but also the substance of those decisions dealing with "seaworthiness" and "negligence" under the Jones Act.

The decision of the District Court and of the Summary Panel of the Court of Appeals for the Fifth Circuit is in conflict with the substance of the decisions of other panels of that Court in considering the obligations of a vessel owner to its crew under the general maritime law and negligence under the Jones Act.

Petitioners submit that any one of the foregoing provides substantial and adequate reason for the granting of a writ, however, when taken in conjunction with each other, issuance of a writ appears to be mandatory to resolve the conflicts resulting from the decision of the District Court and the affirmance by the Summary Panel.

Failure of this Court to issue the writ petitioned for will condone the refusal of the District Court and the Court of Appeals for the Fifth Circuit to follow and apply the law as clearly announced by this Court. In the words of Mr. Justice Roberts and Mr. Justice Frankfurter in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455,

> "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and

> apply the laws as clearly announced by this court. If litigants and *lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them.*" (Emphasis ours)

Although the jurisprudence of this Court pointed the way and clearly established the rules which are the basic premise of this petition, the first case directly on point was decided by the Court of Appeals for the First Circuit in *Myers v. Isthmian Lines, Inc.*, 282 F.2d. 28. There the Court, in a matter which cannot be distinguished on the legal principles involved here wrote:

> "That was the situation here. The chains were knowlingly place by the defendant. Either they made the vessel insufficiently safe, or they did not. Correspondingly, the defendant was liable for negligence *and* unseaworthiness, of for neither."

Myers petitioned this Court for a writ of certiorari, which was denied. 365 U.S. 804, 81 S.Ct. 469.

The Second Circuit, in a later similar case, *Spano v. Koninklijke Rotterdamsche Lloyd*, 472 F.2d 33, stated the premise somewhat differently, and reached the same result, holding

> "In the light of the jury's finding, by special verdict, that there was no unseaworthiness, that is, there was nothing in the condition of the ship which could render the owner liable, it is clear that the jury never needed to reach the question of

whether or not the owner failed in a duty to warn or correct."

And quoted with approval Gilmore and Black, The Law of Admiralty, 365 (1957) as follows:

> "Any difficulty on this point and others directed to the charge could have been avoided if counsel had not insisted on alleging both negligence and unseaworthiness. It is hard to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy."

In *Rice v. Atlantic Gulf and Pacific*, 484 F.2d 1318 (1970), we find the Second Circuit holding that a verdict of no negligence would not preclude a jury for finding unseaworthiness, in a unitary set of facts and circumstances, if the issue had been submitted to them.

The Second Circuit in deciding *Peymann v. Perini Corporation*, 507 F.2d 1320 (1974), a case involving a directed verdict on negligence and a jury finding of seaworthiness, said:

> "Since manifestly plaintiff could not have cumulative recoveries, *Myers v. Isthiman Lines, Inc.*, 1 Cir., 1960, 282 F.2d 28, 29-30 & n. 1, cert. denied, 365 U.S. 804, 81 S.Ct. 469, 5 L.Ed.2d 461, *and could not recover under the Jones Act count at all unless he established unseaworthiness*, it was appropriate to submit that issue to the jury, under the second count, as the single question.***No purpose would be served in asking the jury to

> travel a second, and longer, road, to the same destination. (Emphasis ours)

Peymann petitioned to this Court for a writ of certiorari, which was denied, 421 U.S. 914, 96 S.Ct. 1572 (1975).

Decisions of this Court have clearly defined the obligations of the shipowner to furnish the crew with a seaworthy vessel and his liability for negligence under the Jones Act. *Pope & Talbot v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, (1953) held, among other things, that the obligation was "in the nature of liability without fault."

This Court has consistently held that "the duty to provide a seaworthy ship depends not at all upon the negligence of the ship owner or his agents" *Mahnich*, supra.; and, "the owners duty to furnish a seaworthy ship is absolute and completely independent of his duty under the *Jones Act to "exercise reasonably care****. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence", *Mitchell v. Trawler Racer*, 362 U.S. 551, 80 S.Ct. 926, *Pope & Talbot v. Hawn;* supra.; *Boudoin v. Lykes Bros. S.S. Co.*, infra. (Emphasis ours)

Further, "unseaworthiness is a *condition*, and how that condition came into being - whether by negligence or otherwise - is quite irrelevant to the owners liability for personal injuries resulting from it", *Usner v. Luchenbach Overseas Corp.*, 400 U.S. 499, 91 S. Ct. 514.

In *Michalic v. Cleveland Tankers*, 364 U.S. 325, 81 S.Ct. 6, this Court reaffirmed *Mahnich*, supra and quoting with approval from *Cox v. Esso Shipping Co.*, 247 F.2d 629,

(5th Cir. 1957) said:

> "The vessels duty to furnish tools reasonably fit for their intended use is absolute *** and this duty is completely independent of the owners duty under the Jones Act to exercise reasonable care*** one is an absolute duty, the other, due care. *** no amount of due care or prudence excuses him. **** In contrast, under the negligence concept, there is only the duty to use due care ***."

Seaworthiness is not limited to the vessel and her equipment. It includes and extends to her crew. If the crew is inadequate, improperly trained, or given an improper order, the vessel would be unseaworthy. As this Court held in *Boudoin v. Lykes Bros. S.S.Co.*, 348 U.S. 336, 75 S.Ct. 382, and reaffirmed in *Waldron v. Moore-McCormack Lines, Inc.* 386 U.S. 724, 87 S.Ct. 1410:

> "Unseaworthiness extends not only to the vessel but to the crew ***. We see no reason to draw a line between the ship and the gear on one hand, and the ship's personnel on the other."

Decisions of other panels of the Court of Appeal for the Fifth Circuit, i.e. *Usner*, supra, *Cox v. Esso*, supra, *Vickers v. Tumey*, 290 F.2d 426 and *Perry v. Morgan Guaranty Trust Company of New York*, 528 F.2d 1378 disclose that the Judges deciding those cases were aware of, and properly applied the tests for seaworthiness and negligence and determined the obligations of the vessel owners thereunder.

In the instant case it is unquestioned that all of the training and supervision which Street received aboard the M/V MOHAWK EXPRESS came primarily from the captain. The jury verdict that the vessel was seaworthy was a finding that the vessel and her owners discharged this "unique and awsome obligation." [3] To reach this verdict the jury concluded that her crew were properly trained in all of their duties to the vessel and each other, including working safely. How then, could the owner be negligent?

To reach such a verdict, the jury must have concluded that under the Jones Act, Mohawk Towing Company, Inc., was the insurer of its crews, and as such responsible for anything that happened to them. Such a premise is false and unsupportable. Alternatively, it was a "sympathy verdict" i.e. *Larry Street disappeared, someone has to pay.*

To permit this decision of the District Court and the Court of Appeal for the Fifth Circuit to go unchallenged in the words of Mr. Justice Harlan in *Michalic*, supra, will cause trial courts to be "deprived of all significant control over jury verdicts, and if juries are in effect to be allowed to roam at large ** the lower federal courts should be so told."

Here the opposite, which is equally applicable is true, the lower federal courts involved should be told not to permit juries to roam at large and to follow the jurisprudence of this Court and of the First and Second Courts of Appeal, which it has approved, relating to the legal issues involved.

3, Vickers v. Tumey, supra.

CONCLUSION

The confusion and lack of respect for our Courts which will result if this Court does not exercise its right to review the decision of the District Court and the Court of Appeal for the Fifth Circuit were well described by Mr. Justice Douglas in *Usner*, supra, and when quoting from *Mahnich*, supra he wrote:

> "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversey.*** Changes in membership do change decisions; and those changes are expected at the level of constitutional law. But when private rights not rooted in the Constitution are at issue, it is surprising to find law made by new judges taking the place of law made by prior judges."

The decision which is the subject of this petition was erroneous, and contrary to well recognized jurisprudence of this Court and the Court of Appeal for the First and Second circuits.

It is submitted that the foregoing clearly establishes this Court should grant the writ petitioned for.

New Orleans, Louisiana, July 10th, 1978.

Respectfully submitted,

JOSEPH V. FERGUSON,II
JOSEPH V. FERGUSON, III

By: _____

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New Orleans, Louisiana
70130

522-4747

Attorneys for Petitioners,
Mohawk Towing Company, Inc.
and The Home Insurance
Company

CERTIFICATE

This is to certify that a copy of the foregoing was served upon plaintiffs-respondents, LUTHER L. STREET, JR., ET AL., by mailing same to opposing counsel, Dan C. Garner, Esq., Dan C. Garner & Associates, 3612 One Shell Square, New Orleans, Louisiana 70139 and Norman L. Williams, Magnolia Life Building, Lake Charles, Louisiana.

_____

JOSEPH V. FERGUSON, II

APPENDIX A
PER CURIAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77 - 2683
Summary Calender*

LUTHER L. STREET, JR., ET AL.,
Plaintiffs-Appellees,

versus

MOHAWK TOWING CO., INC., ET AL.,
Defendants-Appellants,

UNION CARBIDE CORPORATION,
Defendant.

Appeal from the United States District Court for the
Eastern District of Louisiana

(June 2, 1978)

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

Excerpt from Docket Sheet - U.S. District Court, Eastern District of Louisiana, Street, et al vs. Mohawk Towing Co., et al.

6/24/77 60 Pltfs' Mtn for Judgment N.O.V., or in the alt. for a new trial, in regard to the issue of Unseaworthiness; Hrg. 7/6/77 @ 9 AM.

6/27/77 61 Defts' Mtn for Judgment N.O.V. or alt. for a new trial or remittitur; Hrg. 7/20/77 @ 9 AM.

6/27/77 62 Defts' Memo in Opposition to Pltfs' Mtn for Judgment N.O.V. or alt. for a new trial.

7/1/77 63 M.E.; Hrg. on Mtns set for 7/6/77 CONTINUED to 7/20/77 (RBW) Ent. 7/1/77

7/11/77 64 Pltfs' MEMO in Opposition to defts' Mtn for Judgment N.O.V., or in the alt. for a new trial or remittitur.

7/20/77 65 M.E. of Hrg on defts' mtn for judgment NOV or alt. for new trial or remittitur; Pltfs' mtn for judgment NOV on alt. new trial; DENIED. (RBW) Ent. 7/21/77

7/27/77 66 Defts', Mohawk and Home Ins., NOTICE OF APPEAL

7/27/77 67 SUPERSEDEAS AND COST BOND

8/2/77 68 Defts. Mohawk Towing Co. & Home Ins. Co.'s Mtn & ORDER that execution of judgment of 6-16-77 against defts. Mohawk & Home Ins. be stayed, pending decision of Appeals Court. (RBW) ent. 8-4-77

APPENDIX C

MEMORANDUM TO COUNSEL OR PARTIES FROM CLERK CIRCUIT COURT - 5TH CIRCUIT

United States Court of Appeals
Fifth Circuit
Office of the Clerk
June 2, 1978

Edward W. Wadsworth
Clerk

Tel.504-589-6514
600 Camp Street
New Orleans, La. 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77-2683 - LUTHER L. STREET, JR., ET AL. v. MOHAWK TOWING CO., INC., ET AL.; UNION CARBIDE CORPORATION

Dear Counsel:

Enclosed is a copy of the Court's Rule 21 Decision this day rendered in the above case which has been entered as the judgment required by Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. ***A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.***

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By s/ Doria Call
Deputy Clerk

enc.
cc: Messrs. Joseph V. Ferguson, II
Joseph V. Ferguson, III
Messrs. Dan C. Garner
Kenneth M. Henke

APPENDIX C
FIFTH CIRCUIT STATEMENT ON PETITIONS FOR REHEARING OR REHEARING EN BANC

NECESSITY FOR FILING

It is not necessary to file a petition for rehearing in the Court of Appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

PETITION FOR PANEL REHEARING

A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not to be used for reargument of the issue previously presented or to attack the court's well settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.

EXTRAORDINARY NATURE OF PETITIONS FOR REHEARING EN BANC

A petition for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for *panel rehearing* but not for rehearing en banc.

THE MOST ABUSED PREROGATIVE

Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such petitions were filed in 15% of the cases decided by this circuit last year, less than 1% of the cases decided by the court are reheard en banc; and most of the rehearings granted resulted from a request for en banc reconsideration by a judge of the court initiated independent of any petition.

PETITION FOR REHEARING EN BANC

Twenty-five copies of every petition suggesting rehearing en banc shall be filed. The petition shall be complete in itself and shall in no case refer to or adopt by reference any matter from other briefs or motions in the case. The form and contents of the petition are set out in Local Rule 12(b).

Under Fifth Circuit Local Rule 12, counsel are required to file a written statement setting forth why, in their studied professional judgment, the case should be reheard en banc, listing either the Fifth Circuit or Supreme Court cases with which the decision conflicts or the questions of exceptional importance which would require en banc consideration. Therefore, unless these rigid standards of Federal Rule of Appellate Procedure 35 are met, the duty of counsel is fully discharged without the filing of such a petition.

RESPONSE TO PETITIONS

No response to a petition for rehearing or rehearing en banc should be filed unless requested by the Court.

TIME AND FORM--EXTENSIONS

The petition (panel or en banc) must be filed within 14 days after the date of the opinion. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered a sufficient reason, as clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed by Rule 40(b) F.R.A.P.

RULE 12, EN BANC

(a) *Procedure.* A suggestion for a hearing or rehearing en banc may be made as provided in F.R.A.P. 35 and herein or by any judge of the court in active service on his own motion.

The court en banc shall consist of all circuit judges in regular active service of the circuit. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if that judge sat on the panel at the original hearing thereof. *See also* Fed. R. App. P. 35, 28 U.S.C. § 46(c), and Allen v. Johnson, 391 F.2d 527 (5th Cir. 1969). If rehearing en banc is granted, every party shall furnish to the clerk 15 additional copies of every brief the party has previously filed.

(b) *Form of Suggestion.* Twenty-five copies of every petition suggesting rehearing en banc shall be filed. The petition shall be complete in itself and shall in no case refer to or adopt by reference any matter from other briefs or motions in the case. It shall contain the following items, in order:

(1) The certificate of interested persons required for briefs by Local Rule 13(f)(1);

(2) Where the petitioner for rehearing en banc is represented by counsel, one or both of the following statements of counsel is applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [citing specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence]

Attorney of record for

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of F.R.A.P. 35(a).

(3) Table of contents and citations;

(4) A statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A petition for rehearing en banc is an extraordinary proce-

dure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for *panel rehearing* but not for rehearing en banc;

(5) A statement of the course of proceedings and disposition of the case;

(6) A statement of any facts necessary to the argument of the issues;

(7) Argument and authorities. These shall concern only the issues required by paragraph (4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration;

(8) Conclusion; and

(9) Certificate of service.

APPENDIX D
EXCERPTS FROM JURY TRIAL

THE COURT:
Has the jury reached a unanimous verdict?

JUROR:
Yes, sir.

THE COURT:
Would you hand it to my Courtroom deputy?

JUROR:
Yes, sir.

THE CLERK:
Jury verdict Form No. 1: Was the defendant (379) Mohawk Towing Company, Inc., negligent, and if so, was such negligence a cause of the decedent's death? Answer: Yes. No. 2: Was the M/V MOHAWK EXPRESS or its tow unseaworthy, and if so, was such unseaworthiness a proximate cause of his death? Answer: No. No. 3: Was the decedent negligent, and if so, was such negligence a proximate cause of his death? Answer: Yes. No. 4: To what extent, expressed as a percentage of 100, did decedent's death result as a proximate result of his own negligence? Answer: Fifteen percent. No. 5: Without regard to your answers in No. 3 and No. 4, what is the full amount of damages, if any, expressed in dollars due to Luther L. Street, father of the decedent? Answer: $101,000. No. 6: Without regard to your answers in No. 3 and No. 4, what is the full amount of damages, if any, expressed in dollars due to Mrs. Barbara Laverne Street, mother of the (380) decedent? Answer: $123,000. Dated at New Orleans, Louisiana, the 14th day of June, 1977. Signed, Harriet F. Ford, foreperson.

APPENDIX E

25.25-10 Life preservers and other lifesaving equipment required.

25.25-10(a) All motor vessels shall be provided with an approved life preserver for each person on board. Motor vessels carrying passengers for hire shall be provided with an approved adult type life preserver for each person carried, and, in addition, unless the service is such that children are never carried, there shall be provided a number of approved life preservers suitable for children equal to at least 10 percent of the total number of persons carried.

25.25-10(b) All motorboats shall carry lifesaving equipment as follows:

25.25-10(b)(1) Motorboats which carry passengers for hire shall be provided with an approved adult type life preserver for each person carried. In addition, unless the service is such that children are never carried, there shall be provided a number of approved life preservers suitable for children equal to at least 10 percent of the total number of persons carried. Such motorboats may carry special purpose water safety buoyant devices of approved type as excess equipment.

25.25-10(b)(2) Motorboats of Class 3 not carrying passengers for hire shall carry an approved life preserver or ring life buoy for each person on board. Such motorboats may carry special purpose water safety buoyant devices of approved type as excess equipment.

25.25-10(b)(3) Commercial fishing motorboats of Class 3 shall carry an approved life preserver, ring life buoy, or wood float for each person on board.

25.25-10(b)(4) Commercial fishing motorboats of Class A, 1, or 2 shall carry an approved life preserver, ring life buoy, buoyant vest, buoyant cushion, or wood float for each person on board.

25.25-10(b)(5) All other motorboats not otherwise specifically provided for shall carry an approved life preserver, ring life buoy, buoyant vest, special purpose water safety buoyant device, or buoyant cushion for each person on board.

25.25-10(c) All barges carrying passengers for hire shall be provided with an approved adult type life preserver for each person carried, and in addition, unless the service is such that children are never carried, there shall be provided a number of approved life preservers suitable for children equal to at least 10 percent of the total number of persons carried when such barges are regularly operated with motorboats or motor vessels or steam vessels.